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No. 95-1808

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

UNISYS CORPORATION, *et al.*,

Petitioners,

v.

JOHN P. MEINHARDT, for himself and all others similarly situated, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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Dated: June 3, 1996

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court issue a writ of certiorari to determine whether review of the prudence of investment decisions by pension plan fiduciaries should be subject to the arbitrary and capricious standard, in the absence of any conflicting authority?

2. Should this Court issue a writ of certiorari to determine whether voluntary disclosures made by pension plan fiduciaries were materially misleading because they selectively included public information and excluded both public and non-public information, in the absence of any conflicting authority?

3. Should this Court issue a writ of certiorari to determine the scope of the prudence and disclosure obligations of pension plan fiduciaries prior to the entry of final judgment, where further proceedings in the action may alter the nature of the issues?

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COUNTERSTATEMENT OF THE CASE

Petitioners (collectively, "Unisys") seek review of a decision vacating the entry of summary judgment in their favor; the facts surrounding this matter were developed at length in the opinion of the Third Circuit, which Respondents (the "Participants") incorporate by reference. *See In re Unisys Savings Plan Litig.*, 74 F.3d 420, 425-32 (CA3 1996) (Pet. App. 9a-22a).

Pursuant to Rule 15.2, the Participants wish to correct a misstatement of fact: Unisys states that it is not disputed that the participants will have recouped approximately eight-five percent of their Executive Life investments. (Petition at 4). The record is to the contrary.

Unisys conceded before the district court that the financial statements for the relevant pension plans included a seventy-three million dollar loss, approximately forty-one percent of the amount outstanding at the time Executive Life became insolvent. The loss was recognized because there was no assurance of any additional recovery from the liquidation of Executive Life. Moreover, Unisys ignores the loss of interest income suffered while the Participants' funds were frozen due to Executive Life's insolvency.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER THE STANDARD OF REVIEW FOR BREACH OF FIDUCIARY DUTY CLAIMS IN THE ABSENCE OF CONFLICTING AUTHORITY

A. The Decision Below Does Not Conflict With A Decision Of This Court

Unisys asserts that the Third Circuit's decision raises the issue "left open" in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and that it conflicts with *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), which purportedly supplied the answer to that "open" issue. (Petition at 6-8). Neither case is inconsistent with the decision below.

In *Firestone*, this Court held that, under an ERISA plan, a *de novo* standard of review should be applied in a challenge to denial of benefits unless the plan expressly grants the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe its terms, in which case an arbitrary and capricious

standard could apply. 489 U.S. at 115. This Court expressly limited its holding to the standard of review in challenges to a denial of benefits: "We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA." 489 U.S. at 108. This language does not suggest that any question exists concerning the standard of review applicable to claims for breach of fiduciary duty under ERISA. Indeed, as this Court emphasized, the "*wholesale* importation of the arbitrary and capricious standard into ERISA is unwarranted." 489 U.S. at 109 (emphasis in original).

The text of ERISA supports the conclusion that the potential applicability of an arbitrary and capricious standard should be restricted to claims relating to the determination of benefits. The statute includes a provision which delegates the initial responsibility for reviewing the denial of claims to plan fiduciaries. *See* 29 U.S.C. § 1133. In contrast, Congress committed the initial review of fiduciary decisions directly to the courts. *See* 29 U.S.C. § 1132(a)(2), (3). The decision of Congress to commit these claims to the judiciary indicates that it would be inappropriate to apply a deferential standard. *Cf. Adams Fruit Co. Inc. v. Barrett*, 494 U.S. 638, 649 (1990) (deference to an administrative agency is not appropriate where Congress established the judiciary and not the agency as the adjudicator of rights under a statute).

The common law of trusts also supports the conclusion that the potential applicability of an arbitrary and capricious standard should be restricted to benefit claims. Even where a trustee is given discretion, "the Court will interpose if the trustee in administering the trust fails to exercise proper care and skill." *See* Restatement (Second)

of Trusts § 187, comment i. At common law, the investment decisions of trustees were subject to the prudent person rule. *See* Restatement (Second) of Trusts § 227. This is the standard the Third Circuit applied. *See* 74 F.3d at 434 (Pet. App. 25a-26a).

Moreover, the applicability of an arbitrary and capricious standard under *Firestone* is not squarely presented here, since Unisys never placed the actual plan in the record. *See* 74 F.3d at 447 (Pet. App. 51a). This omission is fatal in light of *Firestone*'s holding that an arbitrary and capricious standard may only apply where supported by the text of a controlling plan document.[1] *See Firestone*, 489 U.S. at 111.

Similarly, the decision in *Varity Corp. v. Howe* does not support Unisys' petition. *Varity* did not concern the standard of review applicable to claims for breach of fiduciary duty under ERISA, and this Court's opinion did not address claims that a plan fiduciary breached the duty of prudence. The passage which Unisys has invoked

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[1] In addition, the argument that an arbitrary and capricious standard under *Firestone* should be applied in this case has been waived. The first time Unisys asserted this was at argument in the Court of Appeals, and the issue was not briefed until the petition for rehearing. Under the circumstances, although this Court is not barred from considering the issue, *see City of Houston v. Hill*, 428 U.S. 451, 467 n.16 (1987), it should decline to do so in accordance with its normal practice. *See City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989) (refusing to address argument first raised on petition for rehearing); *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (refusing to address argument first raised on petition for rehearing).

simply explains that allowing beneficiaries to sue individually under Section 502(a)(3) would not enable "lawyers [to] complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing," since *Firestone* would still govern benefit claims regardless of how they are denominated. 116 S. Ct. at 1078-79.

B. The Decision Below Does Not Conflict With Decisions of Courts of Appeals Applying A Deferential Standard of Review

Unisys also attempts to craft a conflict between the Third Circuit's decision in this case and the decision of the First Circuit in *Mahoney v. Board of Trustees*, 973 F.2d 968 (CA1 1992), and purports to support the alleged conflict with *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360 (CA2 1994), and *Moench v. Robertson*, 62 F.3d 553 (CA3 1995), *cert. denied*, 116 S. Ct. 917 (1996). These cases do not conflict with the decision below.

In *Mahoney*, retired longshoremen challenged a decision by plan trustees to increase disproportionately the pensions of longshoremen who were currently working, as opposed to those who were retired. 973 F.2d at 969. The First Circuit applied the "arbitrary and capricious" standard because the trustees had been explicitly granted discretion to benefit one group of beneficiaries over another; it distinguished cases that applied a stricter review because they did not involve the discretionary task of balancing the interests of competing beneficiaries. 973 F.2d at 971.

This case does not involve any balancing of the interests of competing groups of beneficiaries; none of the plan's investors benefited from Unisys' failure to investigate prior to investing. Conversely, *Mahoney* did not involve a challenge to the investment of plan assets. The two cases present no analogy and no inconsistency.

In *John Blair*, the Second Circuit rejected the argument that the *Firestone* arbitrary and capricious standard should apply to claims for breach of fiduciary duty. Like the First Circuit in *Mahoney*, the *John Blair* Court distinguished between claims challenging the trustee's decision to sacrifice beneficiary interests in favor of third parties and claims challenging the trustee's efforts to balance the interests of competing groups of beneficiaries. 26 F.3d at 369. Although *John Blair* did not involve a challenge to fiduciary investment decisions, the Second Circuit's decision to apply *de novo* review is not in conflict with the approach which the Third Circuit followed.

Unisys also incorrectly asserts that the Third Circuit's decision below conflicts with the prior decision of another panel of that Court in *Moench v. Robertson*. Of course, even if the two decisions were truly in conflict, that would not supply a sufficient basis for an exercise of this Court's certiorari jurisdiction.[2] *See Davis v. United States*, 417 U.S. 333, 340 (1974).

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[2] The Third Circuit's Internal Operating Procedures provide that a prior reported opinion is binding upon subsequent panels. 3d Cir. I.O.P. 9.1. It is noteworthy that the author of the opinion in *Unisys* sat on the *Moench* panel, that *Moench* was submitted by Unisys under Rule 28(j) of the Federal Rules of Appellate Procedure and discussed at argument, and that *Moench* served as part of the predicate for Unisys' petition

While the Third Circuit adopted an abuse of discretion standard for reviewing certain investment decisions in *Moench*, it did so in the unique circumstances of an employee stock ownership plan. Given the special nature of these types of plans, the Third Circuit concluded that the failure to apply a deferential standard to decisions to invest in employer securities would potentially read the specific exemption from diversification requirements applicable to these plans out of the statute and would potentially convert employee stock ownership plans into ordinary pension plans, frustrating a legislative intent to encourage employee ownership. 62 F.3d at 570-71. Thus, the *Moench* Court's application of a deferential standard of review was expressly limited to the unique circumstances of an employee stock ownership plan. None of these circumstances are presented here, and there is no conflict between *Moench* and the decision below.

C. The Decision Below Does Not Conflict With Decisions Of Courts of Appeals Requiring a Plaintiff to Demonstrate a Causal Nexus Between a Breach of Duty and a Loss

Unisys also asserts that the decision below "conflicts with those courts of appeals decisions holding that ERISA's causation requirement . . . compels application of a deferential standard of review to challenges to fiduciary investment decisions." (Petition at 10). Unisys cites two

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for rehearing and suggestion for rehearing *en banc*. Plainly, in denying the petition for rehearing, the Third Circuit was of the view that there was no inconsistency between its holding in *Moench* and its holding here.

cases to support this claimed conflict, *Fink v. National Savings and Trust Co.*, 772 F.2d 951 (CADC 1985), and *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915 (CA8 1994). These cases actually were relied upon by the Third Circuit in the decision below. *See* 74 F.3d at 434 (Pet. App. 26a).

As both *Fink* and *Roth* hold, prudence under ERISA is measured according to the statutory standard derived from the common law of trusts, a standard which is applied objectively. *See Fink*, 772 F.2d at 955; *Roth*, 16 F.3d at 917. Unisys relies upon language from Justice Scalia's dissent in *Fink* indicating that he was unaware of any case in which a trustee who happened to make objectively prudent investments had been held liable for losses due to a failure to investigate and evaluate beforehand. 772 F.2d at 962 (Scalia, J., concurring in part and dissenting in part). This approach merely imposes a causation requirement before a fiduciary will be held liable for losses sustained by a plan. *See id.* If a thorough investigation would not have turned up any adverse information, then any subsequent loss would not have been the result of the failure to investigate. Here, the Third Circuit analyzed the record and determined that material evidence of causation existed, pointing to a variety of adverse information that a prudent investigation would have revealed. 74 F.3d at 436 (Pet. App. 29a).

Roth is consistent with this approach of testing the causal link between an alleged loss and a breach of the duty to investigate. *See* 16 F.3d at 919. Thus, neither *Fink* nor *Roth* is in conflict with the decision below.

D. Unisys' "Objective Evidence" Argument Misstates the Law

Lacking a conflicting decision from this Court or a Court of Appeals, Unisys argues that "an abundance of objective evidence" supported the investment decisions since Executive Life was licensed to do business and had received high ratings from two rating services.[3] To support this argument, Unisys cites regulations on the termination of single-employer pension plans and the definition of an "employee benefit plan" under ERISA. *See* 29 C.F.R. §§ 2510.3-3(a), 2617.1 (Resp. App. 8a, 11a). This argument misstates the law, as these regulations do not govern fiduciary investment decisions.

The specific provisions upon which Unisys relies merely set forth the required contents of a termination notice and define when an individual is not a participant covered under an employee pension plan. *See* 29 C.F.R. §§ 2510.3-3(d)(2)(ii)(A)(1), 2617.22(d)(8) (Resp. App. 9a, 12a). These provisions establish minimum requirements, but they do not exempt fiduciaries from the application of the prudent person standard of ERISA Section 404(a). For example, high ratings from certain rating services do not furnish objective evidence of prudence. *See* 29 C.F.R. § 2509.95-1(c) (Resp. App. 7a-8a). *See also Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401 (CA9 1995). Since reliance upon ratings alone does not meet fiduciary standards, the mere fact that Executive Life was licensed to do business

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[3] Unisys omits the fact that a third rating service had issued a distinctly lower rating and that it had other information which raised serious questions about the validity of the two high ratings. 74 F.3d at 427, 436 (Pet. App. 12a, 29a-30a).

does not establish that Unisys' investment decisions were prudent as a matter of law.

II. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER THE DISCLOSURE OBLIGATIONS OF PLAN FIDUCIARIES IN THE ABSENCE OF CONFLICTING AUTHORITY

A. The Decision Below Does Not Conflict With Relevant Regulatory Authority

Unisys asserts that the Third Circuit's holding on its disclosure obligations imposes burdens that conflict with regulations issued by the Department of Labor; this assertion does not create a reasoned basis for the exercise of this Court's jurisdiction.

The issue Unisys seeks to create rests upon a twofold misstatement of the Third Circuit's holding: Unisys contends that the decision imposes upon it a duty to gather public data and to transmit that data on an ongoing basis. The Third Circuit's holding is far more limited: the duty of disclosure only embraces "material information of which [Unisys] had knowledge"[4] and is expressly limited to the situation in which a fiduciary elects to make a disclosure.[5] On the basis of its mischaracterizations of the Third Circuit's holding, Unisys asserts that

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[4] *See Unisys*, 74 F.3d at 443 (Pet. App. 43a).

[5] *See Unisys*, 74 F.3d at 442-43 ("It is important to note what we have not decided. As the uncontroverted record reveals that Unisys elected and indeed intended to communicate with participants . . . we have not determined whether Unisys had a duty under Section 1104(a) to communicate anything at all . . . in the first place."). (Pet. App. 43a).

the decision below conflicts with regulations issued by the Department of Labor under Section 404(c) of ERISA, regulations which it contends limit disclosure duties to non-public information. Unisys' discussion of the regulations issued under Section 404(c) misstates the law.[6]

The regulations at issue govern the availability of an exemption from liability for fiduciaries of certain individual account plans where a plan participant's losses are caused by his exercise of control over the assets in his account. *See* 29 U.S.C. § 1104(c). Unisys relies upon a segment of these regulations that provides as follows:

> (2) *Independent Control.* Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if:
>
> . . .
>
> (ii) A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would

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[6] This argument also ignores the record in two significant respects. First, Unisys ignores the existence of material issues on whether the plans fall within the scope of Section 404(c). *See* 74 F.3d at 446-48 (Pet. App. 49a-52a). Second, Unisys ignores the fact that the information withheld from the Participants included non-public information, such as the default risk which Executive Life revealed during a private meeting with Unisys. 74 F.3d at 429 (Pet. App. 15a).

> violate any provision of federal law or any provision of state law which is not preempted by [ERISA].

29 C.F.R. § 2550.404c-1(c)(2)(ii) (Resp. App. 10a).

This provision does not excuse a fiduciary from furnishing public data. Instead, it imposes a disclosure duty upon fiduciaries seeking relief from potential liability, mandating that they disclose material non-public information. This section also implies that a broader disclosure obligation may exist in a particular case by indicating that the question whether a participant has exercised independent control turns on the facts of each case. In fact, a parallel provision of the same regulation specifically imposes an affirmative duty to disclose public information to participants in the form of the most recent prospectus for investments subject to the Securities Act of 1933. *See* 29 C.F.R. § 2550.404c-1(b)(2)(B)(1)(viii) (Resp. App. 10a).

There is no conflict between the disclosure duties recognized by the Third Circuit and the regulations issued by the Department of Labor under Section 404(c) of ERISA.

B. The Decision Below Is Consistent With Precedent Developed in the Area of Securities Regulation

Unisys attempts to portray the Third Circuit's analysis of disclosure duties as a deviation from precedents in the securities area, but the effort is unavailing. Unisys commences with the premise that its disclosures could

not be considered misleading if countervailing information was available somewhere else. This assumption is at odds with settled precedent recognizing that where truthful information has been conveyed, liability may still attach if the manner in which the information was disclosed in terms of its prominence and emphasis rendered the overall disclosure misleading.[7] In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), this Court rejected the simplistic analysis that Unisys offers here, reasoning as follows:

> [N]ot every mixture with the true will neutralize the deceptive. If it would take a financial analyst to spot the tension between the one and the other, whatever is misleading will remain materially so, and liability should follow.

501 U.S. at 1097 (citations omitted).

Moreover, the contention that public information is never required to be disclosed under the securities laws is not correct. Companies issuing securities in a public offering under the Securities Act of 1933 or filing reports under the Securities Exchange Act of 1934 must disclose a variety of publicly available information. *See* 17 C.F.R. §§ 229.101(c)(1), 229.103, 229.210(a), (c) (Resp. App. 4a-7a).

There are cases in which courts properly hold that the failure to disclose some item will not result in liability because the allegedly withheld information is widely available. This situation typically arises in fraud-on-the-

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[7] *See, e.g., Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 200-03 (CA5), *cert. denied*, 488 U.S. 926 (1988); *see also Greenapple v. Detroit Edison Co.*, 618 F.2d 198, 205, 210 (CA2 1980).

market cases, where liability will not attach to a materially misleading disclosure if the truth "credibly entered the market and dissipated the effects of the misstatements." *Basic, Inc. v. Levinson*, 485 U.S. 224, 249 (1988). In this narrowly circumscribed context, the failure to disclose may be cured by the availability of information elsewhere because these cases rest on the hypothesis that in "an open and developed market," stock prices reflect all available information. *See Basic*, 485 U.S. at 241 (*quoting Peil v. Speiser*, 806 F.2d 1154, 1160-61 (CA3 1986)). Even applying *Basic*, courts require a showing that the undisclosed information entered the market place "with a degree of intensity and credibility sufficient to effectively counter-balance any misleading impression created by the insiders' one-sided representations." *See In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (CA9 1989), *cert. denied*, 496 U.S. 943 (1990). Here, *Basic* and *Apple* have no application because neither the Insurance Contract Fund nor the Fixed Income Fund traded in an open, developed and efficient market. In fact, these two funds did not trade, and individual account balances did not fluctuate in response to adverse news concerning Executive Life.

III. THIS COURT SHOULD NOT EXERCISE JURISDICTION BECAUSE THE ISSUES RAISED IN THE PETITION ARE NOT RIPE FOR DETERMINATION

The procedural posture of this case makes it inappropriate for review by this Court. After vacating the district court's grant of summary judgment, the Third Circuit remanded the matter for further proceedings consistent with its decision. 74 F.3d at 448 (Pet. App. 53a).

In *Virginia Military Institute v. United States*, 113 S. Ct. 2431 (1993), this Court denied a petition for a writ of certiorari where the Fourth Circuit had remanded the case to the district court for further proceedings. *See United States v. Virginia*, 976 F.2d 890, 900 (CA4 1992), *cert. denied*, 113 S. Ct. 2431 (1993). The case involved significant constitutional issues under the fourteenth amendment, and the record had been developed with a six-day trial and detailed findings of fact. 976 F.2d at 892. The remand occurred solely to address the appropriate remedy. 976 F.2d at 900. The military college sought certiorari to review the adverse ruling made by the court of appeals. In commenting upon the Court's denial of a writ of certiorari, Justice Scalia repeated the principle that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." 113 S. Ct. at 2432 (Scalia, J., concurring).

In contrast to *Virginia Military Institute*, this case presents neither a fully developed factual record nor an important constitutional issue that should warrant the Court's immediate attention. Indeed, the Third Circuit catalogued a long list of genuine issues of material fact precluding summary judgment and remanded the case to the district court for further proceedings. As such, the issues in this case simply "are not yet ripe for review." *See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostok R.R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*).

The fact-specific nature of the asserted issues also indicates that this case is not appropriate for review. The Third Circuit's decision rested on the existence of disputed material facts on the Participants' claims that

Unisys violated its duties of prudence and disclosure. 74 F.3d at 437, 443 (Pet. App. 32a, 43a). This Court has long avoided such factual disputes: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., concurring); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (per curiam).

As the Court held long ago in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916):

> [Certiorari] is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *And except in extraordinary cases, the writ is not issued until final decree.* The decree that was sought to be reviewed by certiorari at complainant's instance *was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application.*

Id. at 258 (emphasis added) (citations omitted). Here, Unisys has not presented an "extraordinary case" that would merit the exercise of jurisdiction, and, as such, its request for review is premature and should await final judgment in the case.

CONCLUSION

In light of the foregoing arguments, the petition for a writ of certiorari should be denied.

Dated: June 3, 1996

Respectfully submitted,

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APPENDIX

STATUTES

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * *

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action.

A civil action may be brought –

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

29 U.S.C. § 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall –

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

REGULATIONS OF THE U.S. SECURITIES & EXCHANGE COMMISSION

17 C.F.R. § 229.101 (Item 101) Description of business.

* * *

(c) *Narrative description of business.*

(1) Describe the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant industry segment or each reportable industry segment about which financial information is presented in the financial statements. To the extent material to an understanding of the registrant's business taken as a whole, the description of each such segment shall include the information specified in paragraphs (c)(1) (i) through (x) of this section.

* * *

(iv) The importance to the industry segment and the duration and effect of all patents, trademarks, licenses, franchises and concessions held.

(v) The extent to which the business of the industry segment is or may be seasonal.

(vi) The practices of the registrant and the industry (respective industries) relating to working capital items (*e.g.*, where the registrant is required to carry significant amounts of inventory to meet rapid delivery requirements of customers or to assure itself of a continuous allotment of goods from suppliers; where the registrant provides rights to return merchandise; or where the registrant has provided extended payment terms to customers).

* * *

(x) Competitive conditions in the business involved including, where material, the identity of the particular markets in which the registrant competes, an estimate of the number of competitors and the registrant's competitive position, if known or reasonably available to the registrant.

* * *

17 C.F.R. § 229.103 (Item 103) Legal proceedings.

Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought.

* * *

17 C.F.R. § 229.201 (Item 201) Market Price of and dividends on the registrant's common equity and related stockholder matters.

(a) *Market information.* (1)(i) Identify the principal United States market or markets in which each class of the registrant's common equity is being traded.

* * *

(ii) If the principal United States market for such common equity is an exchange, state the high and low sales prices for the equity for each full quarterly period

within the two most recent fiscal years and any subsequent interim period for which financial statements are included, or are required to be included by Article 3 of Regulation S-X [17 C.F.R. 210], as reported in the consolidated transaction reporting system or, if not so reported, as reported on the principal exchange market for such equity.

(iii) If the principal United States market for such common equity is not an exchange, state the range of high and low bid information for the equity for each full quarterly period within the two most recent fiscal years and any subsequent interim period for which financial statements are included, or are required to be included by Article 3 of Regulation S-X, as regularly quoted in the automated quotation system of a registered securities association, or where the equity is not quoted in such a system, the range of reported high and low bid quotations, indicating the source of such quotations.

* * *

(c) *Dividends.* (1) State the frequency and amount of any cash dividends declared on each class of its common equity by the registrant for the two most recent fiscal years and any subsequent interim period for which financial statements are required to be presented by § 210.3 of Regulation S-X.

* * *

REGULATIONS OF THE DEPARTMENT OF LABOR

29 C.F.R. § 2509.95-1 Interpretive Bulletin relating to the fiduciary standard under ERISA when selecting an annuity provider.

(a) Scope. This Interpretive Bulletin provides guidance concerning certain fiduciary standards under part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104-1114, applicable to the selection of annuity providers for the purpose of pension plan benefit distributions where the plan intends to transfer liability for benefits to the annuity provider.

* * *

(c) Selection of Annuity Providers. * * * In discharging their obligations under section 404(a)(1), 29 U.S.C. 1104(a)(1), to act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and beneficiaries as well as defraying reasonable expenses of administering the plan, fiduciaries choosing an annuity provider for the purpose of making a benefit distribution must take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise. In addition, the fiduciary obligation of prudence, described at section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B) requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. In conducting such a search, a fiduciary must evaluate a number of factors relating to a potential annuity provider's claims paying ability and creditworthiness.

Reliance solely on ratings provided by insurance rating services would not be sufficient to meet this requirement. In this regard, the types of factors a fiduciary should consider would include, among other things:

(1) the quality and diversification of the annuity provider's investment portfolio;

(2) the size of the insurer relative to the proposed contract;

(3) the level of the insurer's capital and surplus;

(4) the lines of business of the annuity provider and other indications of an insurer's exposure to liability;

(5) the structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts;

(6) the availability of additional protection through state guaranty associations and the extent of their guarantees. Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert. * * *

29 C.F.R. § 2510.3-3 Employee benefit plan.

(a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to title I.

* * *

(d) Participant covered under the plan.

* * *

(2)(ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if –

(A) The entire benefit rights of the individual –

(1) Are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization * * *

29 C.F.R. § 2550.404c-1 ERISA section 404(c) plans.

* * *

(b)(2) Opportunity to exercise control. (i) a plan provides a participant or beneficiary an opportunity to exercise control over assets in his account only if:

* * *

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments. For purposes of this subparagraph, a participant or beneficiary will not be considered to have sufficient investment information unless –

(1) The participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):

* * *

(viii) In the case of an investment alternative which is subject to the Securities Act of 1933, and in which the participant or beneficiary has no assets invested, immediately following the participant's or beneficiary's initial investment, a copy of the most recent prospectus provided to the plan. This condition will be deemed satisfied if the participant or beneficiary has been provided with a copy of such most recent prospectus immediately prior to the participant's or beneficiary's initial investment in such alternative;

* * *

(c) Exercise of control.

* * *

(2) Independent control. Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if:

* * *

(ii) A plan fiduciary has concealed material nonpublic facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary

would violate any provision of federal law or any provision of state law which is not preempted by the Act; * * *

29 C.F.R. § 2617.1 Purpose and scope.

(a) Purpose. This part sets forth the rules and procedures for terminating a single-employer pension plan in a standard termination under the Employee Retirement Income Security Act of 1974, as amended. * * *

29 C.F.R. § 2617.2 Definitions.

For purposes of this part:

* * *

Insurer means a company authorized to do business as an insurance carrier under the laws of a state or the District of Columbia.

* * *

29 C.F.R. § 2617.4 Administration of plan during pendency of termination proceedings.

* * *

(c) Exceptions. During the period set forth in paragraph (b) of this section, the plan administrator may pay benefits attributable to employer contributions either through the purchase of irrevocable commitments from an insurer or in a form other than an annuity * * *

29 C.F.R. § 2617.22 Notice of intent to terminate.

(a) General rule. At least 60 days and no more than 90 days before the proposed termination date, the plan administrator shall issue to each person who is (as of the proposed termination date) an affected party a written

notice of intent to terminate containing all of the information specified in paragraph (d) of this section. * * *

(d) Contents of notice. The plan administrator shall include in the notice of intent to terminate all of the following information:

* * *

(8) A statement that, after plan assets have been distributed to provide all benefit liabilities with respect to a participant or a beneficiary of a deceased participant, either by the purchase of an irrevocable commitment or commitments from an insurer to provide benefits or by an alternative form of distribution provided for under the plan, the PBGC's guarantee with respect to that participant's or beneficiary's benefit ends; * * *